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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

JAMES A. BETTERSWORTH,

Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION; OFFICE OF THE COMPTROLLER OF THE CURRENCY; BOARD OF THE FEDERAL RESERVE; FEDERAL RESERVE BANK OF KANSAS CITY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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68 pp

QUESTION PRESENTED FOR REVIEW

I. Does the Privacy Act of 1974 permit a citizen to have access to records kept by a federal agency that contain any reference to the citizen that can be retrieved by the agency, or does it permit access only to records that relate directly to him and are filed under his name or other identifier?

II. Does the Privacy Act of 1974 require that an "adverse determination" that prejudices the plaintiff be the result of a formal action by the defendant administrative agency?

LIST OF PARTIES TO THE PROCEEDING

The Petitioner, who was the Plaintiff below, is James A. Bettersworth.

The Respondents, who were the Defendants in the District Court action, are the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Board of the Federal Reserve, and Federal Reserve Bank of Kansas City.

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The Opinion of the United States Court of Appeals for the Fifth Circuit, No. 00B50262, which appears at 248 F.3d 386 (2001), is reproduced at page 4a of Appendix C.

The unpublished Report and Recommendation of the United States Magistrate Judge in the United States District Court for the Western District of Texas is reproduced at page 20a of Appendix D.

STATEMENT OF JURISDICTION

The Judgment sought to be reviewed was filed by the United States Court of Appeals for the Fifth Circuit on April 12, 2001 (No. 00-50262), in response to the Petitioner's appeal from the District Court's Order. The Court of Appeals denied the Petitioner's Petition for Rehearing on June 12, 2001.

The original unpublished Report and Recommendation of the United States Magistrate Judge, in the United States District Court for the Western District of Texas, Austin Division (No. A-97-CA-624 JN), was filed on February 1, 2000.

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1), which permits review by writ of certiorari "in any civil or criminal case, before or after rendition of judgment or decree."

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution states in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

The Privacy Act of 1974, 5 U.S.C. § 552a, provides in part:

> (a) For purposes of this section--
>
> . . . .
>
> (5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;
>
> . . . .
>
> (d) Each agency that maintains a system of records shall--
>
> (1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence.
>
> (g)(1) Civil remedies. Whenever any agency-
>
> . . . .

> (B) refuses to comply with an individual request under subsection (d)(1) of this section;
>
> . . . .
>
> the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

STATEMENT OF THE CASE

Jurisdiction of the Courts Below

The United States Court of Appeals for the Fifth Circuit, the order of which is sought to be reviewed in this Petition, had jurisdiction of this matter pursuant to 28 U.S.C. § 1291 ("Final decisions of district courts"), which states in part: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . ."

The United States District Court for the Western District of Texas had jurisdiction over this case pursuant to 28 U.S.C. § 1331 ("Federal question"), which provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

> The District Court also had jurisdiction under 5 U.S.C. § 552a(g)(1) ("Civil Remedies"), which states in part:

> Whenever any agency-
>
> . . . .
>
> (B) refuses to comply with an individual request under subsection (d)(1) of this section;
>
> (C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual. . . .
>
> . . . .
>
> the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

Facts

Procedural History

The Petitioner James A. Bettersworth instituted this action on August 21, 1997, against the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency (AOCC"), the Board of the Federal Reserve, and the Federal Reserve Bank of Kansas City (collectively, the "Defendants") for violations of the Privacy Act of 1974, 5 U.S.C. § 552a. He based his complaint on three causes of action: first, that the Defendants had denied him access to records

that he was rightfully entitled to see; second, that the Defendants had made adverse determinations about Mr. Bettersworth based on improperly maintained records; and third, that the Defendants had failed to comply with the Privacy Act so as to have an adverse effect on Mr. Bettersworth.

After various motions were filed by Mr. Bettersworth and the Defendants over the next few years, a Final Judgment was filed by the District Court on February 17, 2000, which dismissed Mr. Bettersworth's claims with prejudice and granted the Defendants' motion to dismiss or in the alternative for summary judgment.

Mr. Bettersworth filed his Notice of Appeal to the Fifth Circuit on March 29, 2000. In a Judgment filed April 12, 2001, the Fifth Circuit affirmed the judgment of the District Court and ordered Mr. Bettersworth to pay to the Defendants the costs on appeal. Motion for Rehearing denied App. 1a.

Background

Mr. Bettersworth has twenty-two years of experience in the banking industry. From 1971 to 1973, he served as vice president of First National Bank, Seguin, Texas. In 1983, he founded First Commercial Bank ("FCB") in Seguin, Texas. He served as chief executive officer and chairman of the board of FCB from 1983 through May, 1990. During that time, the OCC never communicated to him or to the board of FCB that he was unqualified or unfit for the position that he held.

Mr. Bettersworth founded Southwestern Commercial Capital Company ("SWCC") in 1981. SWCC was a specialized lending company under the supervision of the Small

Business Administration ("SBA"). In 1984, Mr. Bettersworth formed Southwestern ComCorp, Inc. ("ComCorp"), a non-bank holding company, into which Mr. Bettersworth put SWCC and Southwestern Venture Capital of Texas ("SVC"). SVC was a small business investment company under the supervision of the SBA. FCB, ComCorp, SWCC, and SVC were recognized by the companies and the federal regulators as affiliates.

From 1985 until 1989, the FCB participated for its own account in the retained portions of SBA loans that were not sold into the government securities market. FCB participated in these loans pursuant to the authority granted for such transactions in 12 C.F.R. 250.250. The OCC regulators approved the participation by FCB in the loans without qualification.

The Affiliate Relationship

In 1987, ComCorp legally acquired by foreclosure the Republic Bank of Tecumseh, Oklahoma ("RBT"). As a result of the discovery process in this litigation, the OCC thought that Mr. Bettersworth had somehow planned the foreclosure to avoid various banking laws.

In 1989, the affiliate relationship among FCB, ComCorp, SWCC, SWVC, and RBT was terminated. Desiring to assure himself that the OCC agreed that the relationship had indeed terminated, Mr. Bettersworth requested a special examination by the OCC to affirm this fact. The OCC confirmed that the relationship had been terminated. From 1989 on, FCB conducted its business with former affiliates in accordance with this finding.

In early 1989, poor health forced Mr. Bettersworth to leave the banking business. In 1991, Liz Corey, an attorney for the OCC, stated in a letter sent to FCB's attorneys that, in her opinion, FCB, ComCorp, and ComCorp's subsidiaries were affiliates in June, 1990. Officially, the OCC never made a formal finding that the companies were affiliated, and the agency dropped the matter. FCB was never cited for violation of the law regarding transactions between affiliates.

The Adverse Determination Made by the OCC

Out of the debate about the affiliate status of the various entities came an adverse determination by the OCC that is at the core of this litigation. In August, 1991, more than eighteen months after Mr. Bettersworth had departed from FCB, John Barlow, an OCC bank examiner, made the following entry in the agency's computerized database, known as the Supervisory Monitoring System ("SMS"):

> and former Pres/CEO/COB James Bettersworth share major blame for the Bank's poor condition. They allowed poor quality assets to be purchased from affiliate SWCC. Bettersworth was also a director and executive officer at Comcorp and SWCC for much of their existence. These individuals should not be approved in an executive capacity at a troubled institution.

This finding was placed in the SMS, which is a proprietary information system that is not known to bankers or to the public. It is accessible only by confidential passwords that are issued to certain employees of the Defendants' agencies. Mr. Barlow later confirmed in his deposition that the only

way that Mr. Bettersworth would be able to gain access to the entries in the SMS about him was by filing a lawsuit such as this one.

Barlow's entry about Mr. Bettersworth was reviewed and approved by the manager of the San Antonio Field office of the OCC. The entry was again reviewed and approved by the Southwestern Regional Office of the OCC, and it was then archived in the SMS as a permanent, official determination of the OCC. Mr. Barlow later testified in his deposition that the purpose of placing the above-noted entry in the SMS was so that anyone inquiring about Mr. Bettersworth would see the entry. He also admitted that the entry did in fact have a negative impact on Mr. Bettersworth.

The Adverse Determination Made by the Board of Governors and the Reserve Bank

In August, 1993, the Petitioner and Jeffrey D. Anderson acquired control of ComCorp. Its primary remaining asset was RBT. In October, 1993, ComCorp field a draft application for bank holding status with the Board of Governors of the Federal Reserve System ("Board") through its agent, the Federal Reserve Bank of Kansas City, Missouri ("Reserve Bank"). In conjunction with this application, Mr. Bettersworth, as a major shareholder of ComCorp, provided personal and financial data to the Board on Board forms provided with the application package. In response to the draft application, the Reserve Bank conducted a background investigation of Mr. Bettersworth based on the information that he had provided. The investigation, conducted by Pam Johnson, an examiner for the Reserve Bank, revealed several negative comments about Mr. Bettersworth, including the

entry by OCC examiner Barlow in the SMS, which was cited earlier.

As a result of her investigation, Ms. Johnson concluded: "This deal stinks! We need to encourage them not to pursue this and to begin a plan of divestiture." She went on to note that Mr. Bettersworth caused many of the problems at FCB and RBT. Under the part of the report labeled "Integrity," she indicated that Mr. Bettersworth manipulated and circumvented the Bank Holding Company Act and 23A. Yet, Mr. Bettersworth was never placed on notice that he was being accused of either.

Ms. Johnson accused Mr. Bettersworth of causing improper affiliate transactions between FCB and ComCorp, despite the determination by the OCC that FCB and ComCorp were no longer affiliated. She also noted that the OCC considered Mr. Bettersworth to be a liberal and innovative banker and that he was unfamiliar with banking laws and regulations. She described Mr. Bettersworth as uncooperative, adversarial, and suffering from manic depression. She stated that Mr. Bettersworth had a sordid banking background with a failed bank in Texas. (In reality, Mr. Bettersworth has never been associated with a failed bank.) Ms. Johnson's determinations about Mr. Bettersworth were never disclosed to him. He was not aware of their existence, and he was not afforded an opportunity to rebut them.

Based on her investigation, Ms. Johnson drafted a letter for the signature of Mr. Stephen E. McBride, the Assistant Vice President of the Reserve Bank. On November 5, 1993, this letter was faxed to the attorneys for ComCorp. It indicated that the prospect for approval of an application for ban-

holding status filed by ComCorp was "extremely dim." This conclusion was based primarily on the adverse determination made about Mr. Bettersworth, which was confirmed during a telephone conversation between Mr. McBride and one of ComCorp's attorneys. McBride made it clear that the transaction would not be approved because of Mr. Bettersworth's involvement and branded Mr. Bettersworth a "troublemaker" and "uncooperative," terms later discovered in Reserve Bank documents obtained in discovery in connection with this action.

In a later conversation between Kevin Moore, an official of the Reserve Bank, and another attorney for ComCorp, Moore confirmed that Mr. Bettersworth was the primary problem with the application and that the application would be viewed favorably if Mr. Bettersworth were not included in the application. Based on the acrimonious condemnation of Mr. Bettersworth, ComCorp decided that proceeding with the application was inadvisable and hurriedly signed a contract agreeing to sell RBT.

Bettersworth's Privacy Act Requests

Mr. Bettersworth decided to re-enter the banking business on October 3, 1995, by forming a new bank in Lakeway, Texas. The investors did not want to proceed with the project unless Mr. Bettersworth could clear his name with bank regulators. Mr. Bettersworth wrote several letters to the Defendants, requesting an opportunity to address issues raised during the ComCorp bank holding company application. The Defendants refused, stating that they had no position about Mr. Bettersworth and were not required to express one.

On October 3, 1995, Mr. Bettersworth made Privacy Act requests of the Defendants. The Defendants refused. On October 30, 1995, Mr. Bettersworth spoke with Kevin Moore on the telephone and asked which individual bank regulators had apparently made adverse comments about him. Mr. Moore did not identify the individuals but indicated that the information about Mr. Bettersworth was taken from Confidential Reports of Examination that were not revealed to banks. Moore stated that, even if those reports contained derogatory information about Mr. Bettersworth, he could not have access to that information.

On August 27, 1997, Mr. Bettersworth filed this action in an attempt to gain access to records used by the Board and the Reserve Bank in making their determinations about him and, if possible, to clear his name. As explained above, the District Court awarded summary judgment to the Defendants and dismissed the Petitioner's action with prejudice. The Fifth Circuit affirmed.

ARGUMENT

I. THIS COURT SHOULD RESOLVE AN APPARENT CONFLICT AMONG THE CIRCUITS ON WHAT CONSTITUTES A "SYSTEM OF RECORDS" WITHIN THE MEANING OF THE PRIVACY ACT OF 1974

A. Introduction

The Privacy Act of 1974, 5 U.S.C. § 552a (1994)("Act"), generally prohibits federal agencies from disclosing "any record which is contained in a system of records by any means of communication to any person, or to another agency,

except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains . . . ." 5 U.S.C. § 552a(b). The Act "safeguards the public from unwarranted collection, maintenance, use and dissemination of personal information contained in agency records . . . by allowing an individual to participate in ensuring that his records are accurate and properly used." *Bartel v. F.A.A.*, 725 F.2d 1403, 1407 (D.C. Cir. 1984).

The issue that this Court is being urged to address is whether the Act intended that a private citizen could obtain access to information to any file, kept by a federal agency, in which his name or other identifier appeared, or whether it restricts access only to files, part of a "system of records," on which the citizen's name or other identifier appears. The latter interpretation would make sense if this were 50 years ago, when files were kept in manilla folders and searching a folder for references to a citizen whose name did not appear on the outside of the folder would be an impossibly burdensome task. This is not at all the case today, however, when computerized records can be searched instantly and effortlessly for any name, word, or phrase that appears within the record.

In short, this Petition respectfully requests that this Court interpret this provision of the Act to clear up a conflict among the Circuits regarding the extent of a citizen's right to avail himself of the protection of the Act.

B. The Act's Legislative History

The Senate bill, S. 3418, modified as the compromise bill, was enacted into law as the Privacy Act. The purposes of the

Act include "the promotion of governmental respect for the privacy of citizens by requiring all departments and agencies of the executive branch and their employees to observe certain constitutional rules in the computerization, collection, management, use, and disclosure of personal information about the individuals." Sen. Rep. No. 93-1183, 93rd Cong., 2d Sess., *reprinted in* U.S. Code Cong. & Admin. News, p. 6916 (1974).

Congress enacted this legislation largely out of concern over "the impact of computer data banks on individual privacy." H.R. Rep. No. 93-1416, p. 7 (1974). The legislative history of the Act makes frequent references to the need to protect against governmental abuse of "personal information." *See, e.g.,* Privacy Act of 1974, Pub. L. No. 93-579, § 2(a)(1), 88 Stat. 1896, 1896 (Congressional findings); S. Rep. 93-1183, at 1. The legislative history makes it plain that Congress intended "personal information" itself to have a broad meaning, encompassing

> all information that describes, locates or indexes anything about an individual including his education, financial transactions, medical history, criminal, or employment record, or that affords a basis for inferring personal characteristics, such as finger and voice prints, photographs, or things done by or to such individual, and the record of his presence, registration, or membership in an organization or activity, or admission to an institution.

S. 3418, 93d Cong., § 301(3) (1974).

The Report from the Committee on Government Opera-

tions, which recommended passage of the Senate Bill, stated:

> The purpose of S. 3418, as amended, is to promote governmental respect for the privacy of citizens by requiring all departments and agencies of the executive branch and their employees to observe certain constitutional rules in the computerization, collection, management, use, and disclosure of personal information about individuals.

The Report went on to explain:

> [The Act] is designed to prevent the kind of illegal, unwise, overbroad investigation and record surveillance of law-abiding citizens produced in recent years from actions of some over-zealous investigators, and the curiosity of some government administrators, or the wrongful disclosure and use, in some cases of personal files held by Federal agencies.

The Report then stated that the Act was intended:

- To prevent the secret gathering of information systems of data banks on Americans by agency employees;

- To set in motion a long-overdue evaluation of the needs of the federal government to acquire and retain personal information on Americans, by requiring stricter review within agencies of criteria for collection and retention; and

- To promote observance of "valued principles of fairness and individual privacy by those who develop, operate, and administer other major institutional and organizational data

banks of government and society." S. Rep. No. 1183, 93rd Cong., 2d Sess. 1-2, *reprinted in* 1974 U.S. Code Cong. & Admin. News 6919 ("USCAN").

Finally, the Report concluded that the underlying premise of the Act is that "good government and efficient management require that basic principles of privacy, confidentiality and due process must apply to all personal information programs and practices of the Federal Government." S. Rep. at 14, USCAN at 6929. In addition, the Senate Report made it clear that an agency must assure the lawful use and proper treatment of information transferred to other agencies when it is used to make a decision about an individual. The Report emphasized that agencies must not

> use the Freedom of Information Act as an excuse to avoid their obligations under this section to obtain informed consent and to assure to the extent possible the lawful use and proper treatment of information transferred to other agencies, when it may be used to make a decision about an individual.

Id.

The legislative history of the Act makes frequent references to the need to protect against governmental abuse of "personal information." *See, e.g.,* Privacy Act of 1974, Pub. L. No. 93-579, § 2(a)(1), 88 Stat. 1896, 1896 (Congressional findings); S. Rep. 93-1183, at 1. The legislative history makes it plain that Congress intended "personal information" itself to have a broad meaning, encompassing

> all information that describes, locates or indexes anything about an individual including his education, financial transactions, medical history, crimi-
>
> nal, or employment record, or that affords a basis for inferring personal characteristics, such as finger and voice prints, photographs, or things done by or to such individual, and the record of his presence, registration, or membership in an organization or activity, or admission to an institution.

S. 3418, 93d Cong., § 301(3) (1974).

In short, the legislative history of the Act suggests that the hair-splitting that the Courts have engaged in, as demonstrated below, is utterly inappropriate, as it contravenes the intent of the statute, which is to bestow the broadest possible rights on the citizenry to obtain access to information held by federal agencies in their computer data banks. Speaking of the House version of the Bill that ultimately was passed, Congressman Erlenborn, in his general comments on the earlier House version of the statute, stated:

> Under this bill we are allowing any individual access to records that are maintained by the Government relative to himself. In other words, any person, any individual can go to the agency that is subject to this act and say "I want copies of anything you have relating to me." 120 Cong. Rec. 36961 (Nov. 21, 1974).

The narrow interpretations of what constitutes a "system of records" under the Act by numerous circuits ignores the intent of Congress in fashioning a powerful tool for citizens

to find out what information federal agencies have gathered and may have disseminated about them.

C. An Overview of the Act's Relevant Provisions

To safeguard the privacy of individual citizens, the Act requires any agency that maintains a "system of records" to publish at least annually a statement in the Federal Register describing that system. *See* 5 U.S.C. § 552a(e)(4). A "system of records" is defined as "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5). A "record" is defined as

> any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.

5 U.S.C. § 552a(a)(4).

The Privacy Act Guidelines promulgated by the Office of Management and Budget provide that individuals have a right of access only to information keyed to the requestor's own name or identifying number or symbol. *See* Privacy Act Implementation: Guidelines and Responsibilities, 40 Fed. Reg. 28,948, 28,957 (July 9, 1975). Of course, the courts are under no obligation to follow guidelines or regulations that are promulgated by agencies. Indeed, these Guidelines ap-

pear to directly contravene the expressed intent of Congress in enacting this legislation.

Determining that a "system of records exists" in a particular case is of the utmost importance, because it "triggers virtually all of the other substantive provisions of the Privacy Act, such as an individual's right to receive copies and to request amendment of her records." *Henke v. United States Department of Commerce*, 83 F.3d 1453, 1459 (D.C. Cir. 1996).

D. Interpreting the "system of records" requirement

i. View that a "system of records" exists so long as the file is retrievable by the requestor's name or other identifier from any file containing information about him

To determine what constitutes a "system of records" within the meaning of the Privacy Act, this Court has long recognized that interpretation must, of course, begin with the language of the statute itself. *See, e.g., Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552, 557-58 (1990).

The Act itself suggests that Congress intended to provide access to agencies' records whenever records pertaining to the requestor are retrievable by the use of his or her name or other identifier, regardless of whether the file has been created under his name or other identifier. Section (e)(4) of the Act requires agencies, when they promulgate their notice of their system of records, to publish "the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records." 5 U.S.C. §

552a(e)(4). This language suggests that retrievability, not actual retrieval, should be the standard for determining whether a "system of records" exists under the Act.

Thus, the rights of a person requesting information under the Act should not depend on how the "file" containing the information is labeled, only upon whether the requested information is retrievable by any means.

The Second Circuit's interpretation of "system of records" is represented by this District Court's interpretation of the Act:

> Correctly construed, the Privacy Act extends to all information contained within an agency's system of records that pertains to an individual and can be retrieved by the individual's name or by some identifier assigned to him, without regard to the content of the information or whether it pertains to the individual's business activities. The scope of information available under the statute is defined not by the content of the record maintained by the agency, but by the retrieval method used in the agency's system of records.

Zeller v. United States, 467 F. Supp. 487, 497 (E.D.N.Y. 1979). This statement suggests that, so long as an individual agency has the means of searching its records for the individual's name or other identifier assigned to him, it is maintaining a "system of records" under the Act. It should go without saying that federal agencies today all possess the ability to search computerized records with blinding speed to unearth any reference to an individual who is attempting to assert his rights under the Act, regardless of how these records are la-

beled.

Some decisions of the Tenth Circuit appear to take the position that, so long as documents requested under the Privacy Act are "name retrievable," then they are within a "system of records" maintained by the agency. *See Howard v. Marsh*, 596 F. Supp. 1107, 1111 (E.D. Mo. 1984), *rev'd on other grounds*, 785 F.2d 645 (8th Cir. 1986), *cert. denied*, 479 U.S. 988 (1986).

In another Privacy Act decision, the Tenth Circuit considered whether a former civilian employee of the U.S. Army was entitled to access to an Investigative Report under the auspices of the Inspector General and four memoranda. The memoranda consisted of a list containing a description of certain documents sent and received by the former employee and three other memoranda, all of which were prepared by an attorney in the office of the Staff Judge Advocate at White Sands Missile Range. The court concluded without discussion that the former employee was entitled under the Privacy Act to see these records. *See Hernandez v. Alexander*, 671 F.2d 402, 408 (10th Cir. 1982).

Other decisions of the Tenth Circuit are difficult to reconcile with these, however, as its decisions in *Wren v. Heckler*, 744 F.2d 86, 89 (10th Cir. 1984), and *Gowan v. United States Department of Air Force*, 148 F.3d 1182, 1191 (10th Cir. 1998), discussed immediately below, illustrate.

The view that a "system of records" exists so long as the file is retrievable by the requestor's name or other identifier is fully supported by the express terms of the Act, its legislative history, and the decisions cited above. Moreover, this view is in keeping with the reality of the extraordinary capa-

bilities of modern data retrieval software, which can search volumes of entries in seconds when provided with a name or other key word or phrase. Some have argued that the term "system of records" must be construed narrowly so that agencies are not disrupted by the inundation of Privacy Act requests by individuals whose names or other identifiers do not actually appear on files retrieved by the agency. Even if this argument ever carried any weight, it collapses when considered in light of the blinding speed at which modern computers, armed with data retrieval software, operate today. So long as the name or other identifier of the person requesting information under the Act exists somewhere in the file, it can be ferreted out in a matter of seconds nowadays.

ii. View that a "system of records" exists only when the agency has an actual practice of retrieving information by the name of the individual found on the record itself

Focusing on Congress's use of the phrase "is retrieved" in the Privacy Act, the D.C. Circuit held in *Henke v. United States Department of Commerce*, 83 F.3d 1453 (D.C. Cir. 1996), that a group of records generally should not be considered a "system of records" within the meaning of the Privacy Act unless the agency actually retrieves records keyed to individuals and that retrieval capability is not alone sufficient to create a system of records. 83 F.3d at 1460. The court cautioned, however, that the agency's retrieval practice is only one factor in determining whether a "system of records" exists in a particular case. Courts should also consider "the agency's function and the purpose for which the information was gathered" when determining whether a group of records qualifies as a system of records. *Id.* at 1461.

The court reasoned that the phrase "system of records" should be narrowly construed because, under an expansive reading of the phrase,

> an agency faces the threat of being found retrospectively to be maintaining a system of records it did not even know existed, simply by dint of a potential use it neither engaged in nor contemplated. This in turn would create serious compliance problems for the agency, because if it had not recognized that it maintained a system of records and had therefore not published notice of its system in the Federal Register, then neither would it have followed the procedures necessary [under the Act].
>
> . . .

Id.

In another decision of the D.C. Circuit, the plaintiff was held not entitled to daily reports prepared by an agency investigation because they were not accessible by the plaintiff's name or other personal identifier, but by the name of the agency investigator who prepared them. *See Smiertka v. United States Department of Treasury*, 447 F.Supp. 221, 228-29 (D.D.C. 1978), *vacated and remanded on other grounds*, 604 F.2d 698 (D.C. Cir. 1979).

The Third Circuit rebuffed a plaintiff's attempt under the Privacy Act to obtain access to portions of investigative files complied as a result of his complaints and the ensuing investigations of his former employer regarding alleged OSHA violations in *Cuccaro v. Secretary of Labor*, 770 F.2d 355 (3d Cir. 1985). The court held that the requested documents

were not contained within a "system of records" retrievable by the name of the individual requesting the information. It took the position that individuals have a right to access under the Privacy Act only to information in a record that is maintained in a system of records "cued to the requestor's own name or identifier." 770 F.2d at 360.

The Sixth Circuit held that notes kept in a locked drawer and labeled the "First Assistant's" filed were not accessible under the Privacy Act because they were not retrievable by the plaintiff's name or other personal identifier, but by the name of the agency investigator who prepared them. *See Hudson v. Reno*, 130 F.3d 1193, 1206 (6th Cir. 1997). The Court reached the same result in *Manuel v. Veterans Administration Hospital*, 857 F.2d 1112, 1119 (6th Cir. 1988), *cert. denied*, 489 U.S. 1055 (1989))(daily reports containing references to investigations conducted by the Veterans Administration held not to qualify as "records" contained in a "system of records" because they were not accessible by the plaintiff's name or other personal identifier, but by the name of the agency investigator who prepared them).

As noted earlier, decisions of the Tenth Circuit seem in conflict concerning what constitutes a "system of records" under the Act. Thus, it held that a plaintiff's request under the Act was properly denied when the only identifier on the file for which he sought disclosure was the word "Ethics," even though the plaintiff's file was the only one in existence in the "Ethics" file when he made his first request under the Act. The court reasoned that the word "Ethics" was not a personal identifier of the plaintiff and thus did not fall within the definition of a "record" as "any item, collection, or grouping of information about an individual that is main-

tained by an agency . . . that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(4). *See Gowan v. United States Department of Air Force*, 148 F.3d 1182, 1191 (10th Cir. 1998).

In another Tenth Circuit decision, a plaintiff's request under the Act to obtain access to a document was denied because it was not part of a "system of records," notwithstanding that it contained information relating to the plaintiff, since it was not retrievable by the plaintiff's name or other identifying symbol. *See Wren v. Heckler*, 744 F.2d 86, 89 (10th Cir. 1984). Retrieval of the document was accomplished by a document search, and access to the file was limited to three employees of the agency. *Id.*

The Eleventh Circuit appears also to have taken the narrow view of what constitutes a "system of records." It held in *Boyd v. Secretary of Navy*, 709 F.2d 684, 686 (11th Cir. 1983), *cert. denied sub nom. Boyd v. Lehman*, 464 U.S. 1043 (1984), that individuals have a right to access under the Privacy Act only to information in a record that is maintained in a system of records cued to the requestor's own name or identifier. The court noted that the memorandum sought by the plaintiff was not in a "system of records" because it was not keyed to his name or any identifying number, was kept in a "random-type" file, and could be retrieved only by searching through the file. 709 F.2d at 686-87.

These decisions ignore the express terms of the Act; its legislative history, which indicates that the Act was intended to afford citizens the broadest powers to ascertain what information about them held in agencies' files had been re-

leased to others; and the reality of modern data retrieval systems, which permit anyone with a nodding familiarity with computers to retrieve almost instantaneously any information about a particular individual that is contained in computerized files, no matter how voluminous.

Only this Court has the authority to return to the citizens of this county the important rights and safeguards that were intended by Congress when it enacted the Privacy Act more than a quarter of a century ago. The confusion that currently exists about the scope of protection afforded under the Privacy Act can be stated simply. Can the citizen assert his rights under the Act whenever information can be found about him *in* an agency file, or only when his name or other identifier appears *on* the file?

II. THIS COURT SHOULD RESOLVE AN APPARENT CONFLICT AMONG THE CIRCUITS ON WHAT CONSTITUTES AN "ADVERSE DETERMINATION" WITHIN THE MEANING OF THE PRIVACY ACT OF 1974.

The Privacy Act provides that an individual can bring an action against that

> fails to maintain any record concerning [the] individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a *determination* is made which is *adverse* to the individual. . .

5 U.S.C. § 552a (g) (1) (C) (emphasis added). Courts are in disagreement about what is meant by an adverse determination, a conflict that only this Court can resolve.

i. The view that a determination is adverse only when it has been made by the defendant agency

The Fifth Circuit stated in its opinion below that the defendant agencies asked it to hold that the word "determination" as used in Section 552a (g) (1) (B) must mean "something akin to a formal or final administrative decision." *Bettersworth .v FDIC*, 248 F.3d 386, 393 (5th Cir. 2001). Although the Court declined to go that far, it affirmed the District Court's conclusion that Mr. Bettersworth's adverse determination claim failed because there was no evidence of an adverse administrative determination against him. *Id.*

The D.C. Circuit has taken the position that the critical phrase in the Act "consequently a determination is made" means that the adverse determination need not to be made by the agency that is being sued by the plaintiff in order for a damage actions to properly lie. The court reasoned:

> This choice of grammar, which is the only time the passive voice is used in the section dealing with civil remedies, unambiguously subjects [the defendant agency] to a damage action when an adverse determination "is made," whether by [the defendant agency] or by another agency.

Dickson v. Office of Personnel Management, 828 F.2d 32, 37 (D.C. Cir. 1987).

iii. The view that the plaintiff's response to the agency's objectionable is not an "adverse determination"

Although the Ninth Circuit did not rule definitively on whether only an agency can make an "adverse determination," its decision in one case that the plaintiff's resignation as a result of his unacceptable treatment at the hands of the agency did not constitute an "adverse determination" based upon personnel records permitting the award of damages under the Privacy Act. *See Hewitt v. Grabicki,* 794 F.2d 1373, 1379 (9th Cir. 1986). In short, the confusion that exists among the Circuits regarding the meaning of an "adverse determination" under the Act limits the Act's effectiveness as a remedy for an aggrieved citizen.

CONCLUSION

The undersigned respectfully requests that this Court grant certiorari in this matter for the reasons stated above.

Respectfully submitted,

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APPENDIX A - ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED JUNE 12, 2001

No. 00-50262

JAMES A. BETTERSWORTH,
Plaintiff-Appellant,
v

FEDERAL DEPOSIT INSURANCE CORPORATION; OFFICE OF THE COMPTROLLER OF THE CURRENCY; BOARD OF THE FEDERAL RESERVE; FEDERAL RESERVE BANK OF KANSAS CITY,
Defendants-Appellees.

Appeal from the United States District Court
For the Western District of Texas, Austin

ON PETITION FOR REHEARING

Before REAVLEY, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:

IT IS ORDERD that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

s/ Harold R. DeMoss
United States Circuit Judge

APPENDIX B - JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED APRIL 12, 2001

No. 00-50262

D.C. Docket No. A-97-CV-624-JN

JAMES A. BETTERSWORTH,

Plaintiff-Appellant,

v

FEDERAL DEPOSIT INSURANCE CORPORATION; OFFICE OF THE COMPTROLLER OF THE CURRENCY; BOARD OF THE FEDERAL RESERVE; FEDERAL RESERVE BANK OF KANSAS CITY,

Defendants-Appellees.

Appeal from the United States District Court
For the Western District of Texas, Austin

Before REAVLEY, SMITH, and DeMOSS, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the cost on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: Jun 20, 2001

APPENDIX C - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED MAY 12, 2001

Revised May 3, 2001

No. 00-50262

JAMES A. BETTERSWORTH,

Plaintiff-Appellant,

VERSUS

FEDERAL DEPOSIT INSURANCE CORPORATION; OFFICE OF THE COMPTROLLER OF THE CURRENCY; BOARD OF THE FEDERAL RESERVE; FEDERAL RESERVE BANK OF KANSAS CITY,

Defendants-Appellees.

Appeal from the United States District Court
For the Western District of Texas

Before REAVLEY, SMITH, and DeMOSS, Circuit Judges.

DeMOSS, Circuit Judge:

Plaintiff James A. Bettersworth appeals the district court's order granting summary judgment in favor of defendants, the Federal Deposit Insurance Corporation (FDIC), the Of-

fice of the Comptroller of the Currency (Office of the Comptroller of the Currency), the Board of Governors of the Federal Reserve System (the Board), and the Federal Reserve Bank of Kansas City (the Reserve Bank), and dismissing his claims. We affirm.

I. BACKGROUND

Bettersworth has an extensive background in the banking industry, which is well documented in the summary judgment record before the Court. Between 1973 and 1980, Bettersworth was employed by the First National Bank of Seguin. In 1981, Bettersworth formed Southwest Commercial Capital, Inc. (SWCC), which is described as a venture capital company. In 1983, Bettersworth founded First Commercial Bank of Seguin, Texas (FCB), a federally chartered bank, where he served as Chief Executive Officer and Chairman of the Board until 1989. In 1984, Bettersworth formed Southwestern ComCorp, Incorporated (ComCorp), a non-bank holding company. Bettersworth also formed a second small business investment company called Southwestern Venture Capital (SVC). Bettersworth placed SWCC and SVC under the umbrella of ComCorp. Bettersworth owned either a participatory interest or a management position or both in these ventures. Bettersworth also owned a controlling interest or management position in other related financial institutions.

In 1987, ComCorp acquired the Republic Bank of Tecumseh, Oklahoma (RBT) by foreclosure, and Bettersworth assumed control of RBT. The Bank Holding Company Act (BHCA), 12 U.S.C. § 1841-1850, provides that no company may gain control of a bank without prior approval of the

Board of Governors of the Federal Reserve System. See 12 U.S.C. § 1841; *id.* § 1842(a). The Act contains an exception to the requirement for prior Board approval when controlling interest in a bank is obtained in the course of collecting upon a previously contracted debt. 12 U.S.C. § 1841(a). In such a case, the company assuming control of the bank must divest itself of the acquired bank shares within two years. Id. That two-year period may be extended one year at a time, but the maximum time period during which a company may hold shares giving it a controlling interest in a bank is five years. Id. ComCorp's foreclosure of a debt owed by one of RBT's officers and guaranteed by RBT assets fell within the foreclosure exception to the requirement for prior Board approval. Moreover, ComCorp received an extension, which permitted ComCorp to hold RBT for up to five years, or until December 1993, before securing Board approval or divesting itself of the RBT assets.

In 1989 or 1990, Bettersworth resigned from his positions with FCB and RBT. Bettersworth also lost control of ComCorp. In early 1993, Bettersworth and a partner regained controlling interest in ComCorp. In October 1993, ComCorp filed an application for bank holding company (BHC) status under the BHCA with the Federal Reserve Bank of Kansas City (the Reserve Bank). Federal Reserve Banks are authorized to receive and review applications for BHC status. The controlling regulations permit the Reserve Bank to either approve the application or to refer it to the Board. See 12 C.F.R. § 225.15. Thus, the Reserve Bank has no authority to finally deny an application for BHC status. When considering whether to approve an application for BHC status, the Board is authorized to consider *inter alia* "the financial and

managerial resources and future prospects of the company or companies and the banks concerned," *id.* § 1842(c)(2), which in turn includes "consideration of the competence, experience, and integrity of the officers, directors, and principal shareholders of the company or bank, *id.* § 1842(c)(5).

ComCorp's application for BHC status proposed that ComCorp retain 100 percent of RBT. The application disclosed Bettersworth's prior affiliations with FCB and RBT. Accordingly, Pamela Johnson, the Reserve Bank official assigned to review the application, began retrieving and reviewing the records maintained by other banking regulatory agencies on those banks.

Johnson reviewed OCC records relating to the financial condition and management of FCB.[1] Those records included unfavorable assessments of both the condition of the bank and the bank's management, including Bettersworth. Records from bank examinations conducted shortly after Bettersworth left FCB reported that the bank was in bad financial shape and suggested that Bettersworth's placement of SBA loans generated by ComCorp or its affiliates contributed to the bank's poor financial status. Johnson also reviewed the OCC's Supervisory Monitoring System (SMS), a confidential database maintained by the OCC and accessible with a password by other banking regulatory agencies. The SMS

[1] The Office of the Comptroller of the Currency (OCC) is the primary federal regulator of nationally chartered banks. OCC is involved in this case because of Bettersworth's affiliation with FCB, a federally chartered bank that was a member of the Federal Reserve System.

likewise contained an entry blaming Bettersworth and another individual for the "bank's poor condition," and concluding that "these individuals should not be approved in an executive capacity at a troubled institution." Bettersworth identifies this statement in the OCC database as an adverse determination within the meaning of the Privacy Act, 5 U.S.C. § 552a(g)(1)(c).

Johnson also reviewed FDIC[2] records relating to the financial condition and management of RBT. Those records included unfavorable assessments of both the condition of the bank and the bank's management, including Bettersworth. Records from examinations conducted after Bettersworth left RBT reported that the bank was in bad financial shape and suggested that Bettersworth's placement of SBA loans generated by ComCorp or its affiliates contributed to the bank's poor financial status. Certain records also suggested that Bettersworth and another individual forced RBT into foreclosure so that SWCC could obtain the assets of RBT without having to comply with the BHCA.

Johnson also telephoned OCC and FDIC examiners familiar with FCB and RBT examinations and discussed these matters with the examiners. Johnson also consulted internal Reserve Bank records. Through her investigations, Johnson

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[2] FDIC is a corporation created by Congress, which insures the deposits of banks and savings associations. FDIC is also the primary federal regulator for state chartered banks that are not members of the Federal Reserve System. FDIC is involved in the case because of Bettersworth's affiliation with RBT, a state chartered bank that was not a member of the Federal Reserve System.

learned that the banks had charged off large loans made to Bettersworth or his companies. Bettersworth's personal guarantee on one such loan had forced his own personal bankruptcy. In sum, Johnson's investigation generated significant questions concerning, among other things, the RBT foreclosure, Bettersworth's decision to place a substantial number of SBA loans generated by his own companies with banks which he also controlled, and Bettersworth's failure to honor or default upon certain loans extended to him personally or to his companies by the banks which he managed. Johnson eventually authored a memo to Reserve Bank vice-president Stephen McBride, setting out the problems with ComCorp's BHCA application.

On November 5, 1993, Reserve Bank vice-president McBride issued a letter stating that the Reserve Bank had completed its review and identified several areas of concern with respect to the application. The areas of concern were stated in some detail and specific questions were posed at the end of the letter, the answers to which could have significantly enhanced the possibility of approval. The letter concluded that, based upon the existing information, the prospects for approval were "extremely dim," and that any further application would be considered directly by the Board. ComCorp did not, however, pursue the application further by providing the specific information requested in an amended application to the Board. Rather, ComCorp abandoned the application and negotiated the sale of RBT, which closed in early 1994.

In 1995, Bettersworth decided he wanted to start a new bank in Lakeway, Texas and began trying to clear his name.

After informal efforts failed, Bettersworth made Privacy Act requests in October 1995. Bettersworth requested records on himself, stating three variations on his name. The agencies responded that they either did not have records responsive to his request or that the documents they had were not subject to the Privacy Act. Bettersworth subsequently learned that the agencies maintained confidential records relating to bank examinations that sometimes contained comments about bank management. Bettersworth made another Privacy Act request for those records, which was denied because the records were not kept in a "system of records" tied to his name. There does not appear to be any dispute about the fact that these records were maintained, in accordance with the agencies' regulatory purpose, in files on the banks with which Bettersworth was affiliated rather than in a file on Bettersworth.

II. PROCEDURAL HISTORY

In August 1997, Bettersworth filed suit claiming that the defendant agencies violated his rights under the Privacy Act, 5 U.S.C. § 552a. Bettersworth raised three claims. First, Bettersworth claimed that the agencies denied his request for access to information about him in a Privacy Act system of records, in violation of 5 U.S.C. § 552a(d)(1) (obligating an agency to provide access to covered records); see also *id.* § 552a(g)(1)(B) (providing a civil remedy for violation of § 552a(d)(1)). Second, Bettersworth claimed that the agencies made a number of adverse determinations about him on the basis of inaccurate and incomplete records, in violation of 5 U.S.C. § 552a(g)(1)(C). Finally, Bettersworth claimed

that the agencies violated subsection 552a(e)(1) (requiring that agencies maintain only such records as are required to perform a legitimate agency function) and subsection 552a(e)(7) (prohibiting the maintenance of records describing how an individual exercised First Amendment rights unless authorized by statute or the subject individual) "in such a way as to have an adverse effect on" him. See 5 U.S.C. § 552a(g)(1)(D).[3]

In January 1998, the agencies filed a motion to dismiss, which was denied. In February 1999, Bettersworth amended his complaint to allege additional facts in support of his three Privacy Act claims. In June 1999, Bettersworth moved for partial summary judgment on the access claim. That same month, the agencies filed a motion to dismiss, or in the alternative, for summary judgment. The district court referred the motions to a magistrate judge, who recommended that the agencies' motion be granted. Bettersworth filed objections, and the district court conducted a de novo review, after which the district court granted the agencies' motion and

[3] Bettersworth also alleged that the agencies violated subsection 552a(e)(5) which requires agencies to "maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination." This statutory obligation is made enforceable by substantively identical language in subsection 552a(g)(1)(C). Bettersworth's allegation under subsection 552a(e)(5) is therefore subsumed by his allegation under subsection 552a(g)(1)(C).

dismissed all of Bettersworth's claims with prejudice. Bettersworth filed a timely notice of appeal.

Summary judgment is appropriate when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. A moving party may rely upon the absence of evidence to support an essential element of the non-movant's case. *See Duffy v. Leading Edge Prods.*, 44 F.3d 308, 310 (5th Cir. 1995). Once that showing is made, the non-moving party is required to come forward with specific and credible facts that would support a reasonable inference of liability with respect to the essential elements of the non-moving party's claims. *Id.* Thus, the district court was charged with examining the summary judgment evidence to determine whether there was evidence supporting each of the essential elements of Bettersworth's access, adverse determination, and adverse effect claims under the Privacy Act. We review the district court's decision granting summary judgment *de novo*, applying the same standards as did the district court. *Id.* at 312.

III. BETTERSWORTH'S ACCESS CLAIM

Subsection 552a(d)(1) of the Privacy Act provides that each agency that maintains a system of records shall:

> (1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may

> require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence.

5 U.S.C. § 552a(d)(1). Subsection 552a(a)(5) defines "system of records" as follows:

> (5) the term "system of records" means a group of any records under the control of any agency from which the information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.

5 U.S.C. § 552a(a)(5). Subsection 552a(g)(1) provides a civil remedy for violation of subsection 552a(d)(1).

The threshold issue in any claim alleging denial of access under the Privacy Act is whether the records sought by the plaintiff are maintained in a "system of records" retrievable by an "identifying particular assigned to" the plaintiff. This qualifying language in the statute reflects a statutory compromise between affording individuals access to those records relating directly to them and protecting federal agencies from the burdensome task of searching through agency records for mere mention of an individual's name. Many of the published Privacy Act cases are aimed at giving meaning to this statutory requirement. *See, e.g., Gowan v. United States Dep't of the Air Force*, 148 F.3d 1182, 1191 (10th Cir. 1998) (file marked "ethics" was not a surrogate identifier for plaintiff under ethics investigation and thus records were not accessible under the Privacy Act, even though the file contained information about the plaintiff); *Hudson v. Reno*,

130 F.3d 1193, 1206 (6th Cir. 1997) (records not accessible under the Privacy Act because not retrievable by the plaintiff's name); *Henke v. United States Dep't of Commerce*, 83 F.3d 1453 (D.C. Cir. 1996) (records not accessible under the Privacy Act, even though agency could search for the records by the plaintiff's name, because the agency as a practical matter did not use the information that way); *Cuccaro v. Secretary of Labor*, 770 F.2d 355, 359-60 (3d Cir. 1985) (documents relating to agency's investigation of accident involving plaintiff were not tied to plaintiff's name and thus not accessible under the Privacy Act); *Wren v. Heckler*, 744 F.2d 86, 90 (10th Cir. 1994) (records not accessible under the Privacy Act because not retrievable by the plaintiff's name, even though the information related to plaintiff).

The district court held that the records Bettersworth wants, primarily information retrieved by Reserve Bank examiner Johnson from various agencies and then included in Reserve Bank files concerning ComCorp's application for BHC status, were not maintained in a system of records retrievable by Bettersworth's name, and were therefore not accessible under § 552a(d)(1). There does not appear to be any dispute about the fact that the records were maintained in files referencing the banks with which Bettersworth was associated, rather than Bettersworth personally. Further, there does not appear to be any dispute about the fact that the files were maintained for the purpose of discharging the responsibilities vested by federal law with the defendant agencies.

Bettersworth urges the Court to interpret the statute broadly to require that he be given access to the agencies' records in this case because the records pertained to him.

Alternatively, Bettersworth maintains that the agencies used the bank files as surrogate identifiers for records pertaining to him. We decline to interpret the statute in a manner that would deny meaning to the statutory language requiring that the records be retrievable "by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5); *id.* § 552a(d)(1). Moreover, Bettersworth's assertion that the agencies used the bank files as a surrogate identifier for information relating to him finds no support in the record. For these reasons, we affirm the district court's dismissal of Bettersworth's claim that he was denied access to records subject to disclosure under the Privacy Act.

IV. BETTERSWORTH'S ADVERSE DETERMINATION CLAIM

Subsection 552a(g)(1)(C) provides a civil remedy whenever an agency:

> fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual.

5 U.S.C. § 552a(g)(1)(C). Bettersworth's adverse determination claim is premised almost entirely upon the Reserve Bank's handling of ComCorp's BHCA application. Specifi-

cally, Bettersworth claims that the following items constitute adverse determinations against him within the meaning of § 552a(g)(1)(C): (1) Reserve Bank vice-president McBride's November 5, 1993 letter informing ComCorp that the prospects for approval of its BHCA application were extremely dim, and that further applications would be reviewed directly by the Board; (2) oral statements made by McBride during a telephone conversation with Bettersworth's lawyers about the viability of ComCorp's BHCA application; (3) Reserve Bank examiner Johnson's working papers and notes prepared in the course of her review of ComCorp's BHCA application; and (4) the entry in the OCC's SMS database flagging Bettersworth's role in the financial decline of FCB. The district court held that Bettersworth's adverse determination claim failed as a matter of law because none of the various statements and writings identified by Bettersworth constituted an "adverse determination" within the meaning of the statute.

The district court held that McBride's November 5, 1993 letter was the only item relied upon by Bettersworth which even potentially constituted an adverse determination. The remaining items concern information allegedly relied upon to draft that letter.[4] The district court held that McBride's No-

[4] On this point, we note that Bettersworth's allegations do not directly identify adverse determinations made by each and every defendant agency. To the contrary, Bettersworth premises his claim against the other defendants primarily upon the fact that the Reserve Bank accessed and relied upon records from the other agencies when making its determination. At least one court has recognized that such a connection may be sufficient to support

vember 5, 1993 letter did not constitute a determination because the letter identified other reasons for the Reserve Bank's disinclination to approve the application. The district court also suggested that ComCorp (or Bettersworth) decided not to pursue an application with the Board because there were no satisfactory answers to the legitimate questions asked in McBride's letter.

The agencies argue that the November 5, 1993 letter cannot be considered an adverse determination because the Reserve Bank had no authority to deny ComCorp's application. The controlling regulations permit only two courses of action; the Reserve Bank can either approve an application for BHC status or refer it to the Board for further consideration. See 12 C.F.R. § 225.15. Thus, the agencies maintain that there could be no determination unless and until ComCorp forwarded an application to the Board and it was finally denied. *See Deters v. United States Parole Comm'n*, 85 F.3d 655 (D.C. 1996). Given that ComCorp abandoned that effort, the matter was terminated before an administrative determination could be made. In this same vein, the defendant agencies maintain that, even if the November 5, 1993 letter constituted a determination of any sort, it would be a determination against ComCorp, the company making the application, rather than against Bettersworth personally. Having reviewed the record, we are persuaded that the diverse

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liability. *See Dickson*, 828 F.2d at 36. Because we affirm the district court's decision that the items identified by Bettersworth do not constitute an adverse determination under the statute in any event, we need not and do not decide whether such a showing is sufficient in this Circuit.

grounds relied upon in the Reserve Bank's letter, coupled with the fact that ComCorp was the entity applying for BHCA status, provide adequate support for the district court's conclusion that the November 5, 1993 letter did not constitute an adverse determination against Bettersworth within the meaning of § 552a(g)(1)(C).

With regard to the remaining items identified by Bettersworth as adverse determinations, the agencies ask the Court to hold that the word "determination" as used in the statute must mean something akin to a formal or final administrative decision. We need not go that far in order to say that no determination was made in this case. At the very least, informal oral or written statements made in the deliberative process about a particular administrative determination do not constitute the determination itself. We therefore affirm the district court's conclusion that Bettersworth's adverse determination claim fails because there was no evidence of an adverse administrative determination against him. See 5 U.S.C. § 552a(g)(1)(C) (providing that the determination must be adverse "to the individual").

V. BETTERSWORTH'S ADVERSE EFFECT CLAIM

Subsection 552a(g)(1)(D) provides for a civil remedy whenever an agency "fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual." Bettersworth asserts that the defendant agencies kept information on him that was unnecessary to the agencies' mandated purpose, in violation of subsection 552a(e)(1), and that the agency maintained records describing Bettersworth's exercise of his First Amendment rights, in violation of subsec-

tion 552a(e)(7). Beyond these general assertions, Bettersworth does not describe what portions of which records maintained by which agencies show such violations. Bettersworth simply states that the cause of action is supported by his affidavit. Bettersworth then relies upon the district court's failure to address this claim in detail to excuse his own duty to brief it on appeal.

Federal Rule of Appellate Procedure 28 requires that appellate parties provide cogent argument, supported by citation to relevant authorities, statutes, and the record, for all points raised on appeal. Without such argument, this Court is in no position to provide any meaningful review. In the absence of such briefing, we decline to address Bettersworth's claim that the district court erroneously dismissed his § 552a(g)(1)(D) claim. *See, e.g., Matter of T-H New Orleans Ltd. Partnership*, 116 F.3d 790, 796 (5th Cir. 1997); *Meadowbriar Home for Children, Inc. v. Gunn*, 81 F.3d 521, 532 (5th Cir. 1996).

CONCLUSION

The district court's order granting summary judgment in favor of the defendants (the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Federal Reserve Bank of Kansas City) and dismissing plaintiff Bettersworth's Privacy Act claims with prejudice is AFFIRMED.

APPENDIX D- REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, FILED FEBRUARY 1, 2000

A-97-CA-624 JN

JAMES A. BETTERSWORTH
Plaintiff,

v.

FDIC, OCC, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM & FEDERAL RESERVE BANK
Defendants.

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

TO: THE HONORABLE JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

Before the Court is Plaintiff's Motion for Partial Summary Judgement (Doc. #55); Defendants' Joint Opposition to Plaintiff's Motion for Partial Summary Judgment (Doc. #70); Plaintiff's Reply to Defendants' Joint Opposition (Doc. #88); Exhibit A to Plaintiff's Motion for Leave to Supplement Summary Judgment Record (Doc. #110); Defendants' Joint Motion to Dismiss or in the Alternative for Summary Judgment (Doc. #57); Defendants' Proposed Findings of Uncontroverted Facts (Doc. #52); Plaintiff's Response to

Defendants' Joint Motion to Dismiss or in the Alternative Summary Judgment (Doc. #72); and Defendants' Joint Reply (Doc. #81). These dispositive motions were referred by United States Chief District Judge James R. Nowlin to the undersigned for a Report and Recommendation as to the merits of the motions pursuant to 28 U.S.C. § 636(b), Rule 72 of the Federal Rules of Civil Procedure, and Rule 1(d) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas. After reviewing the parties' pleadings, relevant case law, as well as the entire case file, the undersigned issues the following Report and Recommendation to the District Court.

I. BACKGROUND

Plaintiff, James Bettersworth, and Defendants, Federal Deposit Insurance Corporation ("FDIC"), the Office of the Controller of the Currency ("OCC"), the Board of Governors of the Federal Reserve System ("Board"), and the Federal Reserve Bank of Kansas City ("Reserve Bank"), have filed cross-motions for summary judgment. Bettersworth was the Chief Executive Officer ("CEO") and Chairman of the Board ("COB") of Southwestern ComCorp., Inc. ("ComCorp"). Following a foreclosure on a debt, ComCorp acquired all voting shares of Republic Bank of Tecumeseh, Tecumeseh, Texas ("Republic") in December 1988. ComCorp decided to retain its controlling shares of Republic. Pursuant to the Bank Holding Company Act's requirement that the Board approve all such acquisitions, *see* 12 U.S.C. §§ 1842 (a)(1), 1841 (a)(1)-(2), ComCorp submitted a draft holding company application to the Reserve Bank. The draft application revealed Bettersworth was the CEO and COB of Republic from August 1987 to May 1989, and that he had also been

CEO and COB of First Commercial Bank ("First Commercial") in Seguin, Oklahoma from May 1983 to May 1990.

On November 5, 1993, the Reserve Bank responded to Bettersworth's draft application with comments outlining concerns with the application, including managerial and financial factors that must be considered under the Bank Holding Company Act. *See* 12 U.S.C. § 1842 (c)(2). The comments detailed concerns with the financial stability of both banks during the time periods Bettersworth served as their CEO and COB. Reserve Bank finally commented that these considerations were not consistent with Board approval largely because Republic had a unfavorable financial condition and ComCorp's debt servicing requirements would place too great a strain on the Bank. The Reserve Bank suggested that if ComCorp wanted to pursue the Application with the Board, it should include a list of additional information. ComCorp did not pursue the application with the Board, and instead sold Republic in March of 1994.

In late 1995, Bettersworth submitted separate requests, pursuant to the Privacy Act, to all Defendants for the agencies' files on "James Austin Bettersworth, James A. Bettersworth, or J. A. Bettersworth." Each Defendant agency responded they did not have records maintained under any of those names and his request was therefore not subject to the Privacy Act or the Freedom of Information Act.

On August 27, 1997, Bettersworth filed this cause of action alleging that Defendants maintained "secret records" concerning him that were contained in "confidential portions" of the OCC and the FDIC bank examination reports, and that the Reserve Bank used these secret records to comment on

the sufficiency of ComCorp's 1993 draft application.[1] Bettersworth's Complaint contains three allegations of Privacy Act violations: (1) that Defendants failed to give him access to these secret records; (2) that Defendants kept inaccurate information resulting in an adverse determination against him; and (3) that Defendants failed to keep only those records that are relevant to fulfill an agency's statutory purpose.

Defendant's previously filed a motion to dismiss presenting largely the same arguments as their current motion for summary judgment. The District court denied the motion stating Bettersworth had sufficiently alleged violations of the Act, but inviting Defendants to present the arguments in a properly supported motion for summary judgment. (Doc. #25).

II. ANALYSIS

A. Standard of Review

Summary judgment is appropriate under Rule 56(c) of the Federal Rules of Civil Procedure only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving

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[1] Bettersworth's amended complaint additionally alleges that Defendant OCC maintained its secret records concerning him in its electronic and paper files for First Commerce. He further alleges that in a OCC Aug. 1991 Supervisory comment the OCC and an adverse regulatory determination under section 914 of the Financial Institution Reform, Recovery, and Enforcement Act of 1989, 12 U.S.C. § 18311,

party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A dispute is genuine only if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

The party seeking summary judgment bears the burden of showing that there is an absence of evidence to support the non-movant's case. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Coleman v. Houston Independent School District*, 13 F.3d 528, 533 (5th Cir. 1997). After a proper motion for summary judgment is made, the non-movant must set forth specific facts showing that there is a genuine issue of material fact for trial. *See Anderson*, 477 U.S. at 248.

The Court views facts in the light most favorable to the non-movant and draws all reasonable inferences in his favor. *See Coleman*, 113 F.3d at 533. Unsupported allegations or affidavit or deposition testimony setting forth ultimate or conclusory facts and conclusions of law are insufficient to defeat a proper motion for summary judgment. *See Duffy v. Leading Edge Products, Inc.*, 44 F.3d 308, 312 (5th Cir. 1995). Applying these standards, the undersigned turns to the merits of the motions for summary of judgment.

B. Privacy Act

The privacy act was enacted in 1974 in an effort to improve the quality of information concerning individuals maintained in agency filed. *See Henke v. United States Department of Commerce*, 83 F.3d 1453, 1456 (D.C. Cir. 1996). The Privacy Act provides, in pertinent part:

> each agency that maintains a system of records shall . . . upon request by an individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him . . . to review the record and have a copy made...

5 U.S.C. § 552a (d)(1). The Act defines a "system of records" as:

> a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.

Id. § 552a (a) (b). The Act encourages government agencies to keep accurate records by requiring them to maintain all records which are used by the agency in making any determination about any individual with accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness. *See id* §522a (e) (5). The Act further prohibits disclosure of any record contained in a system of records by any means of communication to any other person or any other agency unless the individual has given prior written consent, except if disclosure of the information would be required under the Freedom of Information Act.[2] *See Id.* 552a (b) (2).

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[2] The Freedom of Information Act reflects a general philosophy of full agency disclosure with certain delineated statutory exemp-

C. Bettersworth's Claim for Access to Defendants' Records

Bettersworth's first claim is that Defendants maintained secret records concerning him which are subject to the Privacy Act. In order for the Privacy Act to apply, Bettersworth must establish that the agency maintains a system of records by which they can retrieve records by his name or a number or identifier assigned to him, and that Defendants withheld these records from him. *See* 5 U.S.C. § 552a (g) (1) (C). Bettersworth does not dispute that Defendants do not maintain files under his name; however, he argues he is entitled to Defendants' files which contain any references to him.

Generally, Defendants are authorized to evaluate, and in fact are charged with the duty of evaluating, the performance of banking management which involves, *inter alia*, evaluating individual bank officers through periodic bank examinations. *See* 12 U.S.C. §§ 325, 481, 1820 (b) and (d). Specifically, the Board is charged with the administration of the Bank Holding Company Act which prohibits a company from holding more that twenty-five (25%) of voting shares in a bank without Board approval. *See* 12 U.S.C. § 1841, *et. seq*. To this end, the Board assesses the financial and managerial resources of the applicant company and the bank. *See id.* § 1842 (c) (2). The Board delegates the authority to accept and determine the informational completeness of applications for approval to the Federal Reserve Banks. *See* 12 C.F.R. § 225.15.

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tions. *See Dep't of Air Force v. Rose,* 425 U.S. 352, 360-61 (1976).

In this case, Reserve Bank was required to evaluate the managerial competency of Bettersworth in connections with reviewing ComCorp's draft application to acquire Republic. ComCorp's draft applications revealed his previous supervisory positions with First Commercial and Republic Bank. Reserve Bank retrieved those institution's examination files, which contained as part of their examination information on Bettersworth as a bank officer.

Accordingly, documents referencing Bettersworth do appear to exist. However, in responding to a request for information, Congress does not impress upon a federal agency an obligation to "comb its records for mention of a requestor's name." *See Connolly v. Comptroller of the Currency*, 673 F.Supp. 1419, 1424 (S.D. Texas 1987), *rev'd on other grounds*, 876 F.2d 1209 (5th Cir. 1989).

An agency is required to maintain records that are reasonably relevant and necessary to accomplish a statutory mandated purpose. *See* 5 U.S.C. § 552a (e)(1). The Office of Management and Budget Guidelines provide cogent guidance in this area.

> Congress did not intend to require that an individual be given access to information which the agency does not retrieve by reference to his or her name or some other identifying particular. It an individual is named in a record about someone else (or some other type of entity) and his agency only retrieves the portion pertaining to him by reference to the other person's name (or some other organization/subject identifier), the agency is not required to grant him access. Indeed, if this were not the

> case, it would be necessary to establish elaborate cross-reference among records, thereby increasing the potential for privacy abuses.

40 Fed. Reg. 28, 957 (July 9, 1975). Bettersworth does not dispute that Defendant agencies do not index their records under an individual's name. There is no evidence that this system of record-keeping is a covert attempt to conceal information; but, instead, the summary judgment evidence established the system is the most efficient system of accomplishing each Defendant's task of performing bank examinations. There is no evidence that Defendant agencies used financial institutions as a "surrogate identifier" for Bettersworth. Bettersworth does not dispute the names of the financial institutions for which he served as an officer came from information he himself provided to Defendants.

An elaborate cross-referencing index would be unduly burdensome on Defendants and would not further any statutorily mandated purposed. The summary judgment evidence established that records referencing Bettersworth were discovered in response to ComCorp's draft applications by pulling the examination files for the banks for which he served as a financial officer. Because Bettersworth sought files on "Bettersworth" and Defendants' files are maintained according to the name of the financial institution, there is no requirement that Defendants make them accessible to Bettersworth under Privacy Act. Therefore, the undersigned finds that the records Bettersworth seeks are not subject to the Act and he is not entitled to injunctive relief.

D. Defendants Did Not Make and Adverse Determination

Bettersworth's worth second claim is that Defendants failed to maintain accurate records resulting in an adverse determination against him and entitling him to damages under 5 U.S.C. § 552a (g) (1) (c). Although at least one court has held that the "system of records" requirement of 5 U.S.C. § 552a (d) (1) does not apply to 5 U.S.C. § 552a (g) (1) (c),[3] the undersigned notes both sections contain the "system of records" language and is unpersuaded that Congress intended any other meaning than what has previously been applied.

Regardless, the undersigned finds that Bettersworth fails to establish an adverse determination. The only opportunity for Defendants to make a determination was ComCorp's submission of a draft application to retain shares of Republic and thereby become a bank holding company. As stated previously, the Board delegated its authority to review holding company applications to Reserve Bank. Reserve Bank, however, does not have the authority to deny an application on behalf of the Board. Reserve Bank simply compiled a commentary for ComCorp's use in Filing a formal application with the Board.

Defendants' summary judgment evidence establishes a multitude of areas which were not consistent with Board approval. To be certain, some of these areas concerned Bettersworth's involvement in the past with less than financially

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[3] *See Connolly v. Comptroller of the Currency*, 673 F.Supp. 1419, 1424 (S.D. Tex. 1987), *rev'd on other grounds*, 876 F.2d 1209 (5th Cir. 1989)

stable financial institutions. Perhaps these are areas that Bettersworth could not improve for submission to the Board and the Court suspects this is why ComCorp decided not to pursue the application formally. However, the plain language of the Privacy Act requires there can be an adverse determination in order for damages to be assessed. *See* 5 U.S.C. § 552a (g) (1) (C). Because the commentary did not amount to a determination, and indeed Reserve Bank lacked the authority to make a determination. Bettersworth is not entitled to damage pursuant to this section.

III. RECOMMENDATION

The undersigned recommends that the District Court GRANT Defendant's Motion to Dismiss or in the Alternative for Summary Judgment, DENY Plaintiff's Motion for Partial Summary Judgment; and DISMISS WITH PREJUDICE Plaintiff's claims brought against Defendants. The undersigned further recommends that all pending motions in this case be denied as moot.

IV. OBJECTIONS

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battis v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within ten (10) days after that party is served with a copy of the Report shall bar that party from *de novo* review by the

district court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the district court. *See* 28 U.S.C. § 636 (b) (1)(C); *Thomas v. Arn,* 474 U.S. 140, 150-53 (1985); *Douglass v. United Service Auto Assoc.*, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (*en banc).*

The Clerk is directed to send a copy of this Report and Recommendation to the parties by certified mail, return receipt requested.

SIGNED this 1st day of February, 2000.

STEPHEN H. CAPELLE

UNITED STATES
MAGISTRATE JUDGE